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In The

Supreme Court of the United States

October Term 1972

No. 72-

RUDOLPH PRISCO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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No opportunity to question the doctor or the juror was afforded. Since the jury "hung" on two counts of the charges, the inference may

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be drawn that after the illness of one juror had become known to the others, the deliberations were no longer being conducted free from extraneous considerations but may well have impelled the talismen to arrive at a speedy conclusion in order to accommodate their fellow venireman.

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In The

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No. 72-

RUDOLPH PRISCO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Statement

Petitioner appeals from an order of the Court of Appeals of the State of New York affirming an order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn affirmed a judgment of the Supreme Court, Bronx County, convicting petitioner of violating the New York gambling statutes, Section 225.10 and 225.20 of the Penal Law, namely promoting gambling in the first degree and possession of gambling records in the first degree.

It should be noted that a question of first impression was passed upon by the courts below concerning the right of a Trial Judge to have a communication with a juror, summon medical aid for him, and permit the administration of drugs, without ever informing defense counsel until the matter was a fait accompli. Of course there are additional questions of great importance involving the Fourth Amendment, and a question of fairness of trial.

Opinions Below

The Court of Appeals affirmed without opinion on June 1, 1972 (App. 8a). The Appellate Division affirmed with an opinion on November 16, 1971 (App. 1a & 7a). The order of the Court of Appeals, the order and opinion of the Appellate Division appear in the Appendix, infra.

Jurisdiction

The jurisdiction of this Court is predicated upon 28 U.S.C. §1257(3). The Court of Appeals affirmed without opinion in June, 1972. The Appellate Division affirmed the judgment of conviction and its opinion appears in the annexed appendix.

Questions Presented

1. Whether petitioner was denied a fair trial by virtue of the Trial Court's communicating with a member of the jury during its deliberations, summoning the juror's own personal physician, and permitting the administration of a drug without ever notifying defense counsel or petitioner, until after the matter was a fait accompli? (Fourteenth Amendment)

2. Conceding that a Court may react to any medical emergency involving a juror, may the Court permit such juror to resume deliberations after having summoned medical aid for him and permitting the administration of a drug, without first holding a hearing at which defense counsel could question the doctor and, if need be, the juror, about the nature of his illness, the type of drug administered, and his ability to resume deliberations? (Fourteenth Amendment)

3. Whether in this "dropsey" gambling case the petitioner's rights under the Fourth Amendment were violated by the Trial Court's refusal to suppress evidence obtained as a result of an unlawful search and seizure?

4. Whether the petitioner received a fair trial in view of the prosecutor's remarks to the jury that the Trial Judge had already passed upon the propriety of a search and seizure? (Fourteenth Amendment)

Constitutional and Statutory Provisions Involved

The Fourth and Fourteenth Amendments of the United States Constitution are involved as well as Sections 225.10 and 225.20 of the Penal Law, and Section 421, Code of Criminal Procedure, and Section 310.10, Criminal Procedure Law.

Statement of the Case

Introductory

While the Court of Appeals did not write an opinion, the opinion of the Appellate Division is most impressive and interesting since it points out the fact that a matter of first impression is involved, namely whether a Trial Judge, without informing defense counsel or affording him a hearing, may summon medical aid for a juror, permit the administration of a drug, and then allow that juror to resume deliberations without ever informing the defendant or his lawyer until the matter was a fait accompli.

The opinion of the Appellate Division declares, inter alia:

> "However, there is an important question posed by this appeal, apparently one of first impression in this State, concerning the right of the Trial Judge to summon medical aid for a juror while the jury is deliberating without notifying counsel."

The Court continued in its opinion stating the following:

> "No New York statute or case law appears to have considered the precise question as to whether or not a defendant is prejudiced by the failure to notify his counsel after the jury commences deliberations that an ill juror had received medical attention from his own doctor under the direction of the Court."

Since the case was tried in December of 1970, the applicable statute is Section 421 of the Code of Criminal Procedure which provides:

> "After hearing the charge, the jury may either decide in Court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the Court, or to ask them whether they have agreed upon a verdict, and to return them into Court when they have so agreed, or when ordered by the Court." (Underscoring ours.)

Section 310.10 of the Criminal Procedural Law, effective September 1, 1971, provides:

> "Following the Court's charge, the jury must retire to deliberate upon its verdict in a place outside the Courtroom. It must be provided with suitable accommodations therefor and must be continuously kept together under the supervision of an appropriate public servant or servants. Except when so authorized by the Court or when performing administerial duties with respect to the jurors, such public servant or servants may not speak to or communicate with them or permit any other person to do so." (Underscoring supplied.)

In the case at bar, a juror became ill. Although counsel had an office just across the street from the courthouse and could have been present within a matter of a few minutes at the very most, no effort was made to communicate with counsel. The District Attorney who has an office in the same court building apparently was not notified either.

A juror who had become ill was apparently separated from the rest of the jurors and a doctor of his own choice was summoned. This of necessity, must have taken some time during which interval it would have been a simple matter to have notified counsel and the District Attorney.

The doctor apparently examined the ill juror and administered a drug. The type of drug is unknown. The nature of the illness is unknown. The Court made no effort to inquire as to the nature of the illness or the kind of drug administered. The counsel for the defense and the District Attorney were not informed until after the entire episode had ended. An appropriate motion for a mistrial, of course, was made but denied.

A year of a man's life hangs in the balance. The jury was unable to agree as to two similar counts in a consolidated indictment and it is respectfully submitted that it is inferable that perhaps there would have been a disagreement or acquittal had there not been an illness which perhaps caused the jury to resolve their deliberations for the convenience of the ill juror as soon as possible.

The petitioner, Rudolph Prisco, was tried, under two separate indictments charging identical offenses. The first indictment, 1809 of 1969, related to events occurring on March 25, 1969. The later indictment, No. 2231 of 1969, paradoxically related to events of the previous day, namely the 24th day of March 1969. It is significant to note that the indictment relating to the events of March 24th did not involve the use of a search warrant. The indictment relating to the events of March 25th, however, did depend upon the use of a search warrant, predicated upon the events charged in the March 24th true bill (A6).[1]

A hearing wherein a suppression of the evidence and contravention of the search warrant was sought, was held before Justice Dickens prior to the trial. The motions were denied. It is significant, however, that there has been no conviction upon the indictment relating to March 24, 1969, particularly in view of the fact that if the charges therein were improperly brought, the indictment of March 25th would also be vulnerable since without the March 24th activity of the police, which the petitioner maintains was illegal, there could not have been an indictment on March 25th. The search warrant was based on the March 24th activities.

There are two other issues that were raised in the Court below which the petitioner believes also merit consideration; namely, (1) Prisco's

1. Numerals in parentheses preceded by the letter "A" refer to pages of the petitioner's appendix in the Court below, unless otherwise indicated.

motion to contravert the search warrant and suppress the evidence was improperly denied and (2) the District Attorney improperly referred during the trial to a pretrial suppression hearing.

The Suppression Hearing Considered

Patrolman John Hatton, testifying for the defense stated that he applied for a search warrant in this case and submitted an affidavit which was based, however, primarily upon the observations of a brother officer, Detective Laurie (A16, A18). Hatton declared that Detective Laurie informed him that he saw the petitioner on March 24, 1969 dropping certain envelopes at 1910 Belmont Avenue or thereabouts. Laurie also told Hatton, the latter declared, that he saw Prisco enter a certain building at about 2:00 P.M. and leave at about 6:05 P.M. (A18, A19). Hatton recalled that Detective Laurie also mentioned that petitioner had a key in his hand and opened the door to a particular apartment, but that this fact had not been disclosed until the morning of March 25, 1969. Detective Hatton admitted that the presence of a key in the petitioner's hand was not mentioned in the affidavit in support of a search warrant (A20).

Patrolman Hatton acknowledged that Judge Braun signed a search warrant based upon the affidavit itself. At no place in the affidavit is there any mention of having seen the petitioner with a key (A596-A600).

Patrolman Hatton declared that the first time he spoke to Detective Laurie was on the morning of March 25, 1969. Hatton remembered that

Laurie told him that he saw the petitioner enter premises 670 East 176th Street in the Bronx at about 2:00 P.M. and observed him enter apartment 2E at about 2:30 P.M. Hatton related that Laurie then disclosed to him that he saw Prisco leave that apartment at about 6:05 P.M. on March 24th and proceed to the vicinity of 1908-1910 Belmont Avenue, enter a small alleyway, "he removed from one pocket, one packet, and two packets from another pocket and threw it to the ground." Detective Laurie related to Hatton that he then proceeded to pick up these packets without losing sight of them (A27). Inside of each package were slips bearing notations of "Mutuel Racehorse Policy" (A27).

Patrolman Hatton declared that these packets contained 410,000 plays and that 500 plays are sufficient to make the crime a "felony." The officer conceded however that no arrest had been made on the 24th even though a felony apparently had been committed in the presence of Detective Laurie (A30, A31).

Apartment 2E at 670 East 176th Street was leased to one James Ercolani and not to the defendant (A32-A33). Hatton explained that Inspector Guido, Lieutenant Nevins, Detective Laurie and himself executed the search warrant (A34).

Patrolman Hatton asserted that when they reached the apartment, he knocked on the door and announced that he was a police officer. There was no response so he forced the door (A34). (It is to be noted that the patrolman did not announce the fact that he had a search warrant.)

The officer said that upon breaking into the apartment he saw the petitioner seated at a table with a pencil in his hand, apparently writing (A35).

Patrolman Hatton related that there were many pencils, pens, rubber bands, empty manila envelopes, white envelopes, a radio and mutuel race horse policy slips. Hatton asserted that he announced his identity to the petitioner and showed him the search warrant. He also then placed the petitioner under arrest (A36, A37).

Officer Hatton revealed that the petitioner was arrested for a felony committed on "March 24th, at approximately 6:05 P.M." (A37). [2]

Hatton declared that the petitioner had been convicted nine times previously for gambling violations. This was vehemently disputed by the petitioner (A39).

Patrolman Hatton asserted that the mutuel race horse policy slips which were dropped by the petitioner related not to March 24th but to March 17 (A49).

Hatton declared that he did not announce when he knocked on the door on the 25th of March, 1969, that he had a search warrant (A54).

The search warrant itself was directed against James Ercolani (A46).

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2. He had no arrest warrant.

The patrolman explained that although they found a key to the apartment in possession of the petitioner at the time of his arrest, the key was returned to him (A59, A60). Patrolman Hatton admitted that the petitioner had last been arrested for gambling violation twenty-five years ago (A105, A106). This was contrary to the statements made to the judge that signed the search warrant.

Detective Walter Laurie stated that on March 24, 1969, he had been attached to the Public Morals Administrative Division, Manhattan (A118). Detective Laurie stated that he had the petitioner under observation on March 24, 1969, from about 2:30 P.M. when he saw him on the second floor landing of 670 East 176th Street, Bronx. He related that the petitioner emerged from the first floor landing, approached apartment 2E, removed a key from his pocket and entered the apartment (A118-A120).

He recalled that the petitioner emerged from the apartment at about 6:05 P.M. Officer Laurie stated that he had gone to this vicinity to keep Rudolph Prisco under surveillance. Detective Laurie said that he followed the petitioner and saw him throw three packets to the ground in an alleyway. Without losing sight of the packets, the officer declared that he picked them up (A123-A124). The packets themselves contained three different denominations of envelopes secured by a rubber band relating to March 17, 1969 and March 18, 1969 and March 19, 1969 (A125). Laurie admitted that once he had retrieved the package he already knew that a crime had been committed (A126).

Detective Laurie sated that he accompanied Patrolman Hatton to Judge Braun, at which time the search warrant wasobtained (A128).

Detective Laurie described the activities of the 25th of March, 1969, recalling that at about 5:00 P.M. he and several other officers including Patrolman Hatton went o the premises on Belmont Avenue where he had observed the petitioner the day before (A130-A131)

Laurie stationed himself outside the window.

Detective Laurie aimitted that the affidavit for the search warrantdid not mention the bulges in Rudolph Prisco's pockets to which he had testified (A158).

Detective Laurie said that the petitioner on March 24th had left 670 East 176th Street and walked into the alleyway between 1908 and 1910 Belmont Avenue about a block away (A162-A163). The officer stated tha he thought the alleyway was about 10 to 15 feet vide (A163).

Laurie recalled that he was about 65 feet away at this time and did not remember if there were any street lights around (A164).

The detective declared that on March 25th when the petitioner was arrested, no arrest warrant was in his possession (A178).

In the Grand Jury testimony about which Detective Laurie was questioned, he admitted that

he had stated that the petitioner had gone about half way into the alley between 1908 and 1910 Belmont Avenue (A179).

It is significant to view the trial testimony of Detective Laurie and compare it with his hearing testimony. At the trial, Detective Laurie admitted that the alleyway to which he had been referring where Prisco allegedly dropped three packets of policy slips was only four or five feet in width not fifteen (A323). At the trial a "view" of the premises was ordered (A383-A385), and at this "view" it became evident that 1908-1910 Belmont Avenue was a single building and that there were two alleyways in front of that building. This too was a deviation from the testimony at the hearing and showed perhaps perjured testimony on the part of the officers (A387).

Officer Laurie admitted at the trial that he was mistaken that the alleyway was between 1908 and 1910 Belmont Avenue and that the building to the right was really 1900 Belmont Avenue (A391-A392). At the trial, Detective Laurie stated that the distance between the two buildings which he had referred to was only about seven or eight inches (A394).

It is respectfully submitted that under the circumstances the search warrant should have been controverted and the objects seized pursuant to the search warrant should have been suppressed.

The People's Case at Trial

Pursuant to a motion by the petitioner, both of the aforesaid indictments were consolidated for trial (A211). At the opening, the petitioner objected and asked for a mistrial on the grounds that the prosecutor stated that the petitioner was known "by sight" by certain officers (A225).

Detective Laurie testified for the prosecution along pretty much the same lines that he testified to during the hearing (A227, etc.).

It has previously been noted however that in testifying at the trial the detective deviated from his testimony at the suppression hearing. At the hearing he had testified that the alleyway of 1908-1910 Belmont Avenue was about 10 or 15 feet wide but actually at the trial it developed that there was no alleyway between the two buildings at all except perhaps seven or eight inches and that the alleyway was between 1900 and 1908-1910 Belmont Avenue. Actually, 1900 Belmont Avenue was not mentioned either in the affidavit for the search warrant or the hearing testimony (A390-A393).

A serious error was committed by the prosecution during the testimony of Detective Laurie when the Assistant District Attorney during an objection notified the jury that the search warrant had already been approved in another hearing (A337):

> "[Mr. Bornstein] We're not to review the procedure in which a search warrant was obtained. It has already been reviewed and passed upon."

Patrolman Hatton also testified substantially similarly to his testimony as of the hearing.

Inspector Guido and Captain Nevins testified fairly similarly to that of Hatton and Laurie. Nevins, however, declared that he did not remember Hatton saying anything at all when he knocked on the door in an effort to gain entrance to apartment 2E on the 25th of March (A508).

Ironically at the trial itself, however, none of the four officers who testified identified the petitioner as the person whom they saw in the apartment in question at the time of the arrest (A526).

At A543; the Assistant District Attorney again referred to the "hearing" leading the jury to believe that the hearing must have been resolved against the petitioner otherwise there would be no trial.

Inspector Guido and Captain Nevins also testified during the trial. Nevins declared that he did not recall Patrolman Hatton say anything after he had knocked on the door when they sought to execute the search warrant (A508, A509).

Finally, a serious error occurred during the deliberations of the jury when apparently a juror became ill. Neither counsel for the defense nor the petitioner himself were notified. Instead, the Court determined to call a doctor, separated this juror from the jury during the deliberations, and had the doctor administer a drug to this juror,

Defense counsel, Fusco, explained that since his office was only three or four minutes away he could easily have come if he had been notified (A585, A587).

Argument

Point I

SERIOUS ERROR OF CONSTITUTIONAL DIMENSION WAS COMMITTED IN THE TRIAL COURT WHEN A JUROR BECAME ILL AND THE COURT INTERRUPTED THE DELIBERATIONS OF THE VENIREMEN. IT CALLED THE JUROR'S OWN PHYSICIAN, WHO ADMINISTERED A "DRUG" TO THE SICK TALISMAN WITHOUT EVER INFORMING DEFENSE COUNSEL OR THE PETITIONER OF WHAT HAD TRANSPIRED UNTIL IT WAS TOO LATE TO DO ANYTHING ABOUT IT.

NO OPPORTUNITY TO QUESTION THE DOCTOR OR THE JUROR WAS AFFORDED. SINCE THE JURY "HUNG" ON TWO COUNTS OF THE CHARGES, THE INFERENCE MAY BE DRAWN THAT AFTER THE ILLNESS OF ONE JUROR HAD BECOME KNOWN TO THE OTHERS, THE DELIBERATIONS WERE NO LONGER BEING CONDUCTED FREE FROM EXTRANEOUS CONSIDERATIONS BUT MAY WELL HAVE IMPELLED THE TALISMEN TO ARRIVE AT A SPEEDY CONCLUSION IN ORDER TO ACCOMMODATE THEIR FELLOW VENIREMAN.

PRISCO WAS ENTITLED TO BE PRESENT AT EVERY STAGE OF THE PROCEEDINGS BUT WAS NOT IN COURT DURING THE CRUCIAL EVENTS INVOLVING THE ILL JUROR.

We are dealing with Section 421 of the New York Code of Criminal Procedure and are considering Section 310.10 of the New York Criminal Procedure Law, both of which forbid ex parte communications with the jury except as to inquire whether a verdict has been reached. We nevertheless feel it important to remind this Court of Rule 43 of the Federal Rules of Criminal Procedure which forbids ex parte communications with the jury and also requires the presence of the defendant at every stage of the proceedings.

In United States v. Glick, ___F.2d___, (2 Cir., 6/29/72), for example, the Second Circuit declared that it was improper for a judge to even communicate a single word to the jury without notifying defense counsel and the defendant.

In Glick, supra, (11 Cr. L. 2399), the Court of Appeals explained:

> "It is clear to us * * * that the private communications between the judge and jury violated the unequivocal mandate of Rule 43, which requires the defendant to be present 'at every stage of the trial.' See, e.g., United States v. Schor, 418 F.2d 26, 29-30, 6 Cr. L. 2169 (2d Cir., 1969); see also Shields v. United States, 273 U.S. 583 (1927); ABA Project on Minimum Standards for Criminal Justice, Trial by Jury Sec. 5.3 and Commentary at 139-45 (Approved Draft, 1968). Although we recognized that in appropriate circumstances

application of the harmless error rule may not require reversal, we are convinced that judge's bare assertion that the jury could recommend leniency, omitting any limiting or restricting admonitions and given in Glick's absence, was highly prejudicial."

We recognize that it was proper for the Court to procure medical aid for an ill juror. We do not, however, believe that it was consistent with due process of law and a fair trial to have permitted the administration of a drug to such juror and allowed him to resume deliberations without affording Prisco's counsel an opportunity to inquire what drug was administered; what the nature of the illness was; and what effect, if any, this incident had on the propriety of the jury's deliberations and its ultimate verdict.

While we would not suggest that there was a calculated design to keep defense counsel in ignorance, the portent of approving such a procedure cannot eliminate the possibility of such calculated designs. There is no rational explanation in the record as to why defense counsel, whose office was only one block away, had not been notified. Defense counsel on the record stated the following (A586):

> "We don't even know what kind of drug was administered nor was I advised. Here it is 5:22 and Your Honor had come out briefly just about three or four minutes ago and I was not advised that anything had transpired here.

"The Court: You were not present, Mr. Fusco.

"Mr. Fusco: I left my phone number here, and I could have been called. I have an office here just one block away. It would take me exactly three or four minutes to come to this Court and to come to this floor and I was not advised * * *.

"The Court: I assure you that Morphine was not administered * * *.

"Mr. Fusco: Your Honor is not a doctor. Your Honor only knows what the doctor may have related. You don't know what was administered. I don't know what the condition was * * *.

"Mr. Fusco: May I take an exception as to what has transpired?

"The Court: You have any exception you wish." [3]

The Appellate Division declared that there were no controlling precedents but referred to certain cases which they claimed expressed an enlightened view.

In Takarsie v. State, 162 P.2d 197, 199, an Oklahoma case holds:

"We do not think the taking of a juror to the drug store for medicine to relieve his ailment by the bailiff who did not allow him to converse with anyone, while leaving the remaining jurors with the other bailiff

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3. Mr. Fusco implicitly was asking for a hearing. Certainly no hearing was waived.

> was a violation of the terms of the Statute, which provide that the jury must be kept together and not permitted to communicate with any other person."

Another case, Williams v. State, 171 So. 386, an Alabama decision, held as follows:

> "During the deliberation of the jury, one of the jurymen became ill and was allowed to leave the juryroom and spend a short time with his son, a physician, in the private room of the Presiding Judge, and then allowed to resume deliberations with the remaining jurors when he got better. There is nothing to the prejudice of this defendant in the action of the Court in permitting this juror, who was ill, to be attended by his physician, under the supervision of the Court, and without any pretext that the act in any way controlled the judgment of the jury in making up his verdict."

See also: LaGuardia v. State, 190 Md. 450, 55 At.2d 913; Gray v. State, 143 Fla. 588, 197 So. 333; Haley v. State, 123 Miss. 87, 85 So. 129; 23 A C.J.S. Section 1356, p. 955, n. 58.

It is submitted that the interruption of a jury in its deliberations is perhaps the most serious thing that can occur during a trial because it is the verdict of that jury that determines the guilt or innocence of the defendant at trial.

While the courts below assumed upon a barren record that no prejudice occurred, the very least that should have been ordered was a remand of the case for a full hearing at which time the physician, the juror, the Trial Judge, and, if need be, the other jurors, could be questioned to determine whether the verdict was in any way tainted or whether Prisco's rights were in any way traduced.

It cannot be assumed that no prejudice occurred beyond a reasonable doubt (Chapman v. California, 386 U.S. 18).

Point II

THE COURT ERRED IN DENYING PETITIONER'S APPLICATION TO CONTROVERT THE SEARCH WARRANT AND TO SUPPRESS THE EVIDENCE SEIZED PURSUANT THERETO. THIS IS ANOTHER "DROPSEY" CASE AND THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT WAS INSUFFICIENT.

Patrolman Hatton furnished the affidavit based upon the observations of Detective Laurie. Although from the testimony at the hearing, Detective Laurie was present with Patrolman Hatton when the latter sought to obtain the search warrant, the affidavit in support thereof which was presumably read by Detective Laurie, did not mention important observations such as the fact, as later testified to at the hearing by Detective Laurie, that he saw Prisco with a key and that he opened apartment 2E of the premises which were later searched.

The omission to mention the key was an important factor. There were no observations on the 24th of March between 2:30 P.M. and 6:05 P.M. of anyone entering or leaving apartment 2E except Rudolph Prisco. The affidavit related that the informant, without naming him, then followed the petitioner to an alleyway between 1908 and 1910 Belmont Avenue. This apparently was perjurious testimony since at the trial itself, a "view" of premises revealed that there was no alleyway "between" 1908 and 1910 Belmont Avenue. The alleyway which apparently was in mind was between "1900" and the building known as "1908-1910" Belmont Avenue (People v. Alfinito, 16 N.Y.2d 181).

The only observations on the 24th of March were made by Detective Laurie who said that after he had followed the petitioner to the aforesaid alley, he saw Prisco drop some packets which the officer later retrieved. These contained plays of mutuel race horse policy. Thus, this is another one of the so-called "dropsey" cases. Although presumably, the officer knew that a crime had then been committed, no arrest was made.

Detective Laurie had not made any observations inside apartment 2E. The apartment itself was not registered in the name of the petitioner, but rather in the name of someone completely different. The dropping of the three packets at an alleyway a block or so distant from the premises later searched, was the sole basis for obtaining the search warrant.

While search warrants should not be invalidated by interpreting them in a hyper-technical, rather than a common sense manner, the law is nevertheless clear that the magistrate must be informed of the underlying circumstances which support the conclusion and belief of the affiant that his informant was credible and his information reliable (People v. Hendricks, 25 N.Y.2d 129, 139; United States v. Ventresca, 380 U.S. 102).

People v. Hendricks, supra; People v. Malinsky, 15 N.Y.2d 86, 93, 94; People v. McCall, 17 N.Y.2d 152. The affidavit in support of a search warrant must conform to the two-pronged standard set forth in Aguilar v. Texas, 378 U.S. 180, and more recently re-affirmed in Spinelli v. United States, 393 U.S. 410. There the Supreme Court of the United States declared that the affidavit must show (1) whether the informant is in fact reliable, and (2) whether the underlying circumstances as to how the informant came by his information demonstrates sufficient probability of credibility to allow the search of the premises or the person in question (see Jones v. United States, 362 U.S. 257).

The Second Circuit Court of Appeals has indicated that the Jones case may require the affidavit to contain independent factual corroboration of the hearsay.

> "Jones v. United States, 362 U.S. 257, 267-272, 80 S. Ct. 725, 734-736, 4 L. Ed.2d 697 (March 28, 1960) has now established that an affidavit consisting primarily of

> hearsay information may be sufficient to support the issuance of a search warrant. However, the requirement that the affiant shall have personal knowledge still exists, for, under Jones, the affiant must not only believe the hearsay report, but, in all likelihood, the affiant must further demonstrate that his informant has established a reputation for reliability so as to be worthy of belief. In addition, Jones may require that the affidavit include some factual information independently corroborative of the hearsay report."

(United States v. Ramirez, C.A. 2, 1960, 279 F.2d 712.)

The above decision was noted in a case which held an affidavit to be sufficient where the hearsay was corroborated by "additional reliable sources of information" and independent "concrete facts" were presented to the United States Commissioner.

In the case at bar, neither Patrolman Hatton nor any other detective testified that when the search warrant was being executed, that there was any announcement of the authority of the officers, namely that they were armed with a search warrant.

Patrolman Hatton merely said that he knocked on the door and announced that he was a police officer. Captain Nevins never remembered anything having been said at all. Inspector Guido did not remember anything being said about a search warrant.

In executing a search warrant it is essential that before an entry can be made, the officer seeking to execute it must announce his authority and identify himself. This means that until the fact that a search warrant exists is articulated, no entry may be made except an unlawful entry. See Section 799 Code Crim. Pro.; see also Masiello v. United States, 304 F.2d 399 (D.C. Cir. 1962); Sabbath v. United States, 391 U.S. 585, 591 (1968); Miller v. United States, 289 F.2d 894 (D.C. Cir. 1961); and Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953).

The foregoing authorities indicate that except where an emergency exists where personal peril or bodily harm may befall the agents or where a "no knock" endorsement has been affixed to the warrant, there must be an articulation of the authority under which the officer seeking entry is acting, which means that he must disclose the existence of a search warrant.

In the case at bar no such notification was given at any time. Thus the search warrant was clearly executed improperly by the self-admission of the officer who executed it, namely Patrolman Hatton.

Under Section 799 of the Code of Criminal Procedure, the statute clearly requires that an officer announce his authority and his purpose before he attempts to break a door or window in executing a search warrant. This was not done in the case at bar, and thus the procedure in executing the warrant was clearly unconstitutional (Phelps v. McAdoo, 47 Misc. 524, 94 N.Y.S. 265).

It should be noted that there was no provision in this search warrant to dispense with notification before entering the property. The discrepancies between the trial and the hearing clearly reveal that at the hearing or at the trial perjury was committed (People v. Alfinito, supra).

It is again submitted that Detective Laurie was obliged to very accurately describe his observations and Patrolman Hatton was equally obligated to be extremely precise in his affidavit. When describing the alleyway between 1908 and 1910 Belmont Avenue, the information given to the Magistrate was absolutely incorrect. There was just no alleyway there. This would raise the inference that the policy slips were not even obtained in the manner described. There were clearly insufficient observations and surveillance outside of apartment 2E on the 24th of March. There was no evidence of any gambling activity going on at all. The affidavit must stand or fall on its own merits and not on what was later testified to at the hearing or the trial. Since no mention of a key was made in gaining ingress to the apartment, a serious flaw is evident. The hearing court, therefore, should have suppressed the evidence and controverted the search warrant.

Point III

THERE WAS SERIOUS PREJUDICIAL ERROR COMMITTED WHEN THE DISTRICT ATTORNEY IN AT LEAST TWO PLACES DURING THE TRIAL, REFERRED TO THE FACT, IN THE PRESENCE OF THE JURY, THAT THERE HAD BEEN A

"HEARING" WHICH HAD BEEN "PASSED UPON" AND THUS GAVE THE JURY THE IMPRESSION THAT THE SEARCH MUST HAVE BEEN VALID BECAUSE ANOTHER TRIBUNAL HAD APPROVED IT.

It is extremely important to note that the jury convicted the petitioner only on Indictment 1809/69 which was predicated upon use of the search warrant. The jury "hung" on Indictment No. 2281/69 which covered the events upon which the search warrant was later obtained. The trial jurors therefore were, no doubt, very much concerned with the fact that on the 24th day of March there had been no search warrant, but on the 25th since a search warrant had been approved, they must have assumed that the arrest was proper. But to make matters worse, the District Attorney informed them that another tribunal had already reviewed and passed upon the merits of the search warrant. This indicated there had been another hearing prior to the trial and obviously the jurors believed that they should not even second guess another tribunal. Thus, at page A337, the District Attorney declared:

> "Your Honor, I am going to persist in the objection as to the irrelevancy of this matter. We're not to review the procedure in which a search warrant was obtained. It has already been reviewed and passed upon.
>
> "Mr. Fusco: Look, I object to these remarks, I move for a withdrawal of a juror and a mistrial, Judge."

Again, in summation, the District Attorney, Mr. Bornstein, again notified the jury that another proceeding had taken place in this case, namely a "hearing." At page A543, the District Attorney said, "The hearing in this case occurred in November of 1969."

The defense counsel immediately objected and stated that there was no evidence that any hearing had taken place. The Court did not even tell the jurors to disregard the remarks. The Court said that it would, but there is nothing actually instructing the jury to do so (A337, A338).

But even if the instruction had been given, it is clear that it would have made little difference. As Judge Learned Hand very clearly explained:

> "The naive assumption that the prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers, know to be unmitigated fiction * * * The recommendation to the jury of a mental gymnastic which is beyond not only their powers, but everybody elses."

(Nash v. United States, 54 Fed.2d 1006, 1007 [Cir. 2, 1932].)

Thus, the Supreme Court of the United States in Cameron v. Johnson, 390 U.S. 611, 620 declared:

> "We have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be un-

constitutionally applied to suppress protected freedoms." (Citing cases.)

It is not necessary to detail to this Court the fact that prosecutors are quasi judicial officers and bear a high degree of moral responsibility not to prejudice a defendant.

Conclusion

The Petition for Certiorari should be granted and the Judgments of Conviction should be reversed. At the very least, a hearing should be directed with respect to the ex parte communication between the Trial Judge and a juror.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petioner

APPENDIX

Decision and Opinion of Appellate Division

SUPREME COURT, APPELLATE DIVISION
First Department, October 1971

Harold A. Stevens, P.J.,
Louis J. Capozzoli,
Emilio Nunez,
Theodore R. Kupferman,
James B.M. McNally, JJ.

- -x

The People of the State of New York,

Respondent,

-against-

Rudolph Prisco,

Defendant-Appellant.

- -x

Appeal from a judgment of the Supreme Court, Bronx County, rendered on December 17, 1970, convicting defendant of the crimes of Promoting Gambling in the First Degree and Possession of Gambling Records in the First Degree after a trial before Greenfield, J., and a jury.

Irving Anolik, attorney for defendant-appellant

Eliot L. Kaplan of counsel (Burton B. Roberts, District Attorney) for respondent.

Decision and Opinion

4355

McNALLY, J.

The defendant appeals from a judgment of the Supreme Court, Bronx County, rendered December 17, 1970, convicting him, after trial to a jury, of the crimes of promoting gambling in the first degree and possession of gambling records in the first degree and sentencing him to a term of one year.

On this appeal, the defendant claims that (1) his motion to controvert the search warrant and suppress the evidence was improperly denied; (2) the District Attorney improperly referred during the trial to a pre-trial suppression hearing; and (3) the court erroneously permitted a doctor to administer medical treatment to an ill juror after the jury had commenced deliberation without notification to defense counsel.

We have examined these assignments of error and find them to be without merit, and consequently we affirm.

However, there is an important question posed by this appeal, apparently one of first impression in this State, concerning the right of the trial judge to summon medical aid for a juror while the jury is deliberating without notifying counsel.

No New York statute or case law appears to have considered the precise question as to whether or not a defendant is prejudiced by the failure to

notify his counsel after the jury commences deliberations that an ill juror had received medical attention from his own doctor under the direction of the trial court.

This case was tried in December 1970. Consequently Section 421 of the Code of Criminal Procedure applies. It provides:

> "After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court."

Section 310.10 of the Criminal Procedure Law, effective September 1, 1971, provides:

> "Following the court's charge, the jury must retire to deliberate upon its verdict in a place outside the courtroom. It must be provided with suitable accommodations therefor and must be continuously kept together under the supervision of an appropriate public servant or servants. Except when so authorized by the court or when

> performing administerial duties with respect to the jurors, such public servant or servants may not speak to or communicate with them or permit any other person to do so."

It appears upon the discontinuance of the jury's deliberations due to the illness of one of the jurors, the court ascertained the identity of the juror's doctor and, without notifying defense counsel, summoned the doctor to the courthouse where the juror was administered a drug, rested a few moments and then rejoined the other jurors, whereupon deliberations continued. The only communication with the juror related to his physical condition. The physician had indicated that the juror was fully capable of participating in the jury deliberations.

Several cases not necessarily controlling point the way to our decision and appear to us to express an enlightened view.

Takarsie v. State, 162 P.2d 197, 199, an Oklahoma case, holds:

> "We do not think the taking of the juror to the drugstore for medicine to relieve his ailment by the bailiff who did not allow him to converse with anyone, while leaving the remaining jurors with the other bailiff was a violation of the terms of the Statute, which provides that the jury must be kept together and not permitted to communicate with any other person."

Williams v. State, 171 So. 386, an Alabama case, held as follows:

> "During the deliberation of the jury, one of the jurymen became ill and was allowed to leave the jury room and spend a short time with his son, a physician, in the private room of the presiding judge, and then allowed to resume deliberations with the remaining jurors when he got better. There is nothing to the prejudice of this defendant in the action of the court in permitting this juror, who was ill, to be attended by his physician, under the supervision of the court, and without any pretext that the act in any way controlled the judgment of the jury in making up his verdict."

See also: LaGuardia v. State, 190 Md. 450, 58 A.2d 913; Gray v. State, 143 Fla. 588, 197 So. 333; Haley v. State, 123 Miss. 87, 85 So. 129; 23 A C.J.S. §1356, p. 955, n. 58.

A reasonable rule to follow under such circumstances would be to allow the court to determine in its discretion what course of action to follow when a juror becomes ill after deliberations commence. It would appear that it is the court's first duty to summon medical assistance. Defense counsel, defendant and the public prosecutor should be informed as promptly as feasible as to what has taken place. Treatment of an ill juror should not be required to await such notification. Nor should the failure to notify counsel of such fact, mandate reversal of the judgment, absent prejudice to the defendant.

In this case, the trial court represented to counsel that no discussion had occurred other than that relating to the juror's illness; that morphine was not administered and that the doctor had indicated that the juror was fully able to participate in deliberations. In our opinion, the record establishes the fact that the defendant suffered no prejudice by reason of the illness or the medical aid. Here there was no separation from the panel as contemplated by the Statute and consequently no violation of the statutory mandate. The circumstances are not substantially different than the need of a juror to respond to a call of personal necessity or the separation of jurors in different sleeping rooms when resting for the night.

In future cases it would be good practice to detain the doctor in court if possible, and, if not possible, to make suitable arrangements for the doctor to attend at a later date in the event counsel wishes to examine the doctor concerning the matter. Deliberations of the jury should go forward in any event.

Under the circumstances of this case we find no statutory violation or prejudice, and consequently we affirm.

ALL CONCUR

Order of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 16, 1971.

Present-Hon. Harold A. Stevens, Presiding Justice,
Louis J. Capozzoli,
Emilio Nunez,
Theodore R. Kupferman,
James B. M. McNally, Justices.

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The People of the State of New York,

Respondent,

-against-

Rudolph Prisco,

Defendant-Appellant.

----------x

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Greenfield, J.), rendered on December 17, 1970, convicting defendant, after trial by jury, of the crimes of Promoting Gambling in the First Degree and Possession of Gambling Records in the First Degree, and said appeal having been argued by Mr. Irving Anolik of counsel for the appellant, and by Mr. Eliot L. Kaplan of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

Order of Appellate Division

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things affirmed.

ENTER:

HYMAN W. CAMSO
Clerk.

Order of the Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of June in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESSES,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur June 1, 1972.

Order of the Court of Appeals

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1. No. 3. 72
The People & c.,

Respondent,

vs.

Rudolph Prisco,

Appellant.

BE IT REMBERED, That on the 3rd. day of January in the year of our Lord one thousand nine hundred and seventy-two, Rudolph Prisco, the appellant- in this cause, came here unto the Court of Appeals, by Irving Anolik, his attorney-, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent- in said cause, afterwards appeared in said Court of Appeals by Burton B. Roberts, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Irving Anolik, of counsel for the appellant-, and by Marian Blank Belenky, of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

Order of the Court of Appeals

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,

Albany, June 1, 1972.

Order of the Court of Appeals

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon
Clerk.